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U.S. House of Representatives
Committee on Energy and Commerce
 Room 2125, Rayburn House Office Building
 Washington, DC 20515-6115

June 22, 1994

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

The Honorable Reed E. Hundt
 Chairman
 Federal Communications Commission
 1919 M Street, N.W.
 Washington, D.C. 20554

Dear Mr. Chairman:

I am writing to you with regard to the Commission's implementation of the competitive bidding statute enacted by Congress last summer. In particular, I am concerned that the Commission may embark on a path that is not required by the statute, that will lead to protracted litigation, and that will delay both the issuance of licenses in the Personal Communications Service (PCS) and the delivery of such services to the American public.

Moreover, if these delays in fact occur, it is clear that the Commission will find itself in violation of the statute. Section 309(j) requires the Commission to promote "the ... rapid deployment of new technologies, products and services, without ... judicial delays".

As I have noted in other correspondence with the Commission, section 309(j) was drafted as a generic statute, to be used to issue licenses in a variety of different radio services. Given the pending proceedings to create and issue licenses in the proposed Personal Communications Service, and the statutory references to PCS, it is clear that Congress contemplated that the Commission would use competitive bidding procedures to issue PCS licenses. But Congress was careful to build flexibility into the statutory text, and in fact requires flexibility by the Commission by directing it to employ a variety of different methodologies depending on the circumstances. In short, section 309(j) was not drafted solely for the purpose of issuing PCS licenses, a fact discussed at length in the House Committee Report (H.R. Rept. 103-111).

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The reason for requiring a flexible approach to the licensing process is that Congress recognized that each of the various radio services has different characteristics. Some services may be inherently national in scope, and are unlikely to provide an environment in which small businesses can flourish. Other services may permit licensees to serve relatively small, "niche" markets, in which a small business can customize its services to its customers' needs, and thereby prosper. For that reason, subsection (4)(c) of section 309(j) requires that when the Commission takes into account the characteristics of the proposed service it strives to promote economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. A "one size fits all" approach is not appropriate, and was rejected by Congress.

I am troubled, therefore, by a campaign that appears to be underway to force the Commission to adopt spectrum set-asides for businesses owned by members of minority groups and women when it accepts applications for licenses in the Personal Communications Service. I have reviewed a variety of letters sent to you by many of my colleagues in the House, as well as several from Members of the Senate. Regrettably, none of these letters appear to recognize the flexible approach mandated by the statute. None contain any analysis addressing the characteristics of the Personal Communications Service. Rather, most of these letters appear to rely on set-asides that may have been appropriate in another context, but which have little relevance to the issues that the Commission is required to address.

Ironically, several of these letters acknowledge the capital-intensive nature of the new Personal Communications Service. In my analysis, that particular characteristic ought to weigh heavily in the Commission's deliberations, and steer the Commission away from set-asides and towards other mechanisms to meet the requirements of the statute. Artificially reducing the cost of entry for under-capitalized firms to enter a capital-intensive industry will do little to accelerate the delivery of service to the public. It could, however, result in protracted litigation, as well as the unjust enrichment of some of the applicants.

I would also note that the term "set asides" appears nowhere in the statute. Specific reference is made to "tax certificates and bidding preferences and other procedures"; there is no statutory requirement that the Commission employ spectrum set-asides to meet the requirements of the Act.

The legal basis for past Commission policies that were designed to increase the number of Commission licensees that are members of minority groups and women for Title III services is,

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at this juncture, not altogether clear. A significant expansion and extension of those policies to Title II services -- where there is little, if any, nexus between the characteristics of the licensee and the type or quality of the service that is rendered -- is likely to be subjected to extensive litigation, the outcome of which is questionable. The Commission will face a heavy burden to demonstrate that a set aside is a narrowly drawn remedy to address a specific problem. If the Commission's policies in this regard are ultimately overturned in court, the effect could well be to require that all PCS licenses be subjected to a new round of competitive bids, delaying the delivery of service for years.

The Commission need not run that risk. The statute gives the Commission ample flexibility to design competitive bidding rules that are sustainable in court, that do not jeopardize the prompt delivery of service to the public, and that will fulfill the statutory mandate to ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services.

Indeed, one proposal that has been the subject of numerous comments in recent weeks, would achieve the goals of section 309(j) without endangering the Commission's PCS licensing process. This proposal, which would create a so-called "entrepreneurs block", seeks to achieve the requirements of the section by limiting the ability to bid on certain blocks of frequencies to companies that fall under a certain revenue threshold. This will help to ensure that a variety of modest sized and smaller companies will have the ability to compete with each other to acquire licenses on a more equitable basis without facing competition from the largest firms with easier access to significant capital. A large number of firms in the country have the expertise and ability to compete and will be able to provide efficient, competitive PCS service but which have relatively low revenues.

However, several of the commenters have made proposals that fail to recognize the capital-intensive nature of the PCS business. For larger markets, such as New York, Los Angeles and Chicago, a successful competitor will have to be well-capitalized. The recommendation of the Small Business Administration, which suggested that the Commission define small business as a company with gross revenues of less than \$40 million per year, is probably inadequate for large markets. It is highly likely that a company of that size lacks the resources to acquire capital sufficient to design and build a PCS network in these markets. Moreover, a substantial portion of these networks will have to be constructed and operational before

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subscribers can be expected to subscribe to, and pay for, the service, thereby generating revenues for the licensee.

As the size of the market decreases, the ability of smaller businesses to participate will increase. The Commission should recognize that capital requirements will vary depending on the market involved, and establish a sliding scale to assure that well-capitalized firms are not excluded from the larger markets.

In addition, the Commission must confront a variety of other issues. In order to prevent unjust enrichment, for example, the Commission must ensure that winning bidders retain their licenses for a sufficient period of time to ensure that they build and operate a system themselves, and are not acquiring a license merely for speculative purposes.

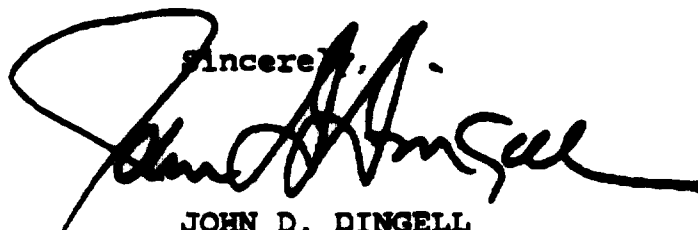
Commenters have suggested several other mechanisms that the Commission can use that will skew the outcome of the bidding process. For example, selectively granting bidding credits to certain bidders, but not to others, can raise serious issues that are certain to be litigated. I urge the Commission to be extremely cautious in this respect, and avoid preferential treatment to some classes of bidders without ensuring that the preference is sufficiently narrow so as to survive court review.

On the other hand, permitting winning bidders, with gross revenues below a threshold amount, to make installment payments over a period of years will grant significant advantages to smaller companies that lack access to capital. Yet it will do so based on economic criteria, and without raising the constitutional issues referred to above.

I recognize that the Commission faces an exceedingly difficult task in crafting rules that will satisfy the requirements of the competitive bidding statute. I stress, however, that Congress has given the Commission the necessary flexibility, and the mandate to utilize such flexibility, to achieve the goals of the law. It is my hope that the Commission will use its discretion wisely, and adopt rules that will expedite the delivery of service to the public, without the delays that are certain to occur if the Commission yields to political pressure and adopts rules that are ultimately rejected by the courts.

I look forward to reviewing the Commission's decision next week.

Sincerely,

A large, stylized handwritten signature in black ink, appearing to read "John D. Dingell".

JOHN D. DINGELL
CHAIRMAN